A **THAY CHEE HUAT & ANOR v. YENG CHONG REALTY BHD**

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[CIVIL APPEAL NO: WA-12BNCVC-41-04-2018]
8 DECEMBER 2020

B

CONTRACT: *Agreement – Sale and purchase agreement – Failure to deliver vacant possession upon payment of full purchase price – Whether vendor repudiated fundamental terms of contract – Whether purchasers claiming for vacant possession or exercising right to accept vendor's breach and rescind contract – Whether*
C *purchasers entitled to claim for refund of purchase price – Whether claim time-barred*

The respondent was the registered and beneficial owner of the pieces of leasehold lands held under five separate land titles ('land'). The respondent developed the land into bungalow plots for the project known as the Bandar
D Golden Valley Golf Resort ('project') on a joint venture basis with MBSB Development Sdn Bhd ('MBSB'). By a sale and purchase agreement ('SPA'), the appellants purchased two bungalow plots of land from the respondent. The appellants claimed to have fully paid the purchase price amounting to RM106,080 with the last instalment made on 21 November 2007. Henceforth, the appellants repeatedly demanded for vacant possession of the
E plots from the respondent but to no avail. The appellants' notice to rescind the SPA and request for the refund of the sum of RM106,080 together with interest at 5% in the total amount of RM40,366 as damages were not responded to by the respondent. The appellants thus filed the suit at the Sessions Court claiming for the sum of RM106,080 with interest at 8% per
F annum from 21 November 2007 until full settlement. The issues ventilated by the Sessions Court Judge ('SCJ') was whether the respondent had breached the SPA and was liable to pay the sum of RM106,800 to the appellants; and (ii) whether the appellants' claim was time-barred. The SCJ dismissed the appellants' claim for being time-barred, in that, the respondent
G should have handed over the vacant possession on 20 October 2002 and the appellants' right to sue accrued on that date and not on the date as pleaded by the appellants. The only issue that arose for consideration in this appeal was whether the appellants' claim was time-barred by para. 6(1)(a) of the Limitation Act 1953 ('LA').

H **Held (allowing appellants' appeal):**

(1) The SCJ evidently took issue with the wordings in the appellants' pleadings as compared with the letter dated 8 July 2013 despite the fact that the respondent did not raise it as one of the arguments in the submissions at the end of the trial. The trial court is not entitled to
I decide a suit on a matter on which no issue has been raised by the parties. Even if the SCJ was minded to undertake an examination of the

matter, she should have invited submissions on the purported variance in the choice of words used in the appellants' pleadings and in the letter before pronouncing her decision. Further, whilst the SCJ had correctly translated the word 'rescission' as 'pembatalan' in the national language, the word 'repudiation' is more accurately translated as 'penolakan' rather than 'penamatan', which is commonly interpreted as 'termination'. A party is said to have repudiated the contract or renounced the contract where that party indicates to the other, by conduct or in clear terms, an intention not to go on with the contract. The SCJ's finding that 'pihak-pihak telah menamatkan kontrak (repudiate) dan bukan membatalkan kontrak (rescind) kerana tiada salah nyata (misrepresentation) atau kesilapan (mistake) dalam kes ini' was flawed. (paras 31-33)

(2) The appellants made it clear that they were not claiming for vacant possession or LD but were exercising their right to opt to accept the respondent's breach and rescind the contract *vide* the letter dated 8 July 2013 thereby bringing the SPA to an end or, in other words, terminating the same. The reliefs sought following the total failure of consideration on the part of the respondent were for a refund of the purchase price paid by the appellants to the respondent in the sum of RM106,080 with interest thereon and costs, and not for LD or damages. (para 35)

(3) It was open to the appellants to take the stance that they were entitled to vacant possession of the said plots only upon full payment of all 96 instalments in light of the opening words in cl. 16(1) of the SPA. Furthermore, despite cl. 25 of the SPA providing that time shall be the essence of the contract, the fact that the appellants continued to make payments towards the purchase price of the plots despite the respondent not having let the appellants into vacant possession of the plots within 36 months from the date of the SPA, *ie*, by 20 October 2002, went to show that the appellants treated the contract as still afoot but time ceased to be of the essence of the contract and became at large. (para 37)

(4) The appellants had given more than reasonable time for the respondent to perform its promise under the SPA. Years had passed and the respondent did not produce any evidence to show that the land had been subdivided. Vacant possession of the plots was definitely not delivered to the appellants and nor was a memorandum of transfer of the lots to the appellants ever executed. The respondent had clearly repudiated the fundamental terms of the contract and was by its own conduct, in default of the same. The appellants opted to accept the repudiation and treat the agreement as at an end when they directed their solicitors to send the letter dated 8 July 2013 to the respondent. (para 39)

(5) The issue of whether the appellants had, by any words or conduct, waived their right to rescind the contract on account of the respondent's repudiation and the right to treat themselves as discharged therefrom was not pleaded in the defence and was not one of the issues to be tried. Nor was there any pleading on estoppel by conduct or any other reason to disentitle the appellants from exercising the right to a rescission of the SPA. In the circumstances, a reasonable time for performance of the respondent's promise ended with the issuance of the letter dated 8 July 2013 when the appellants treated the respondent as having breached the SPA. With such breach, the cause of action accrued and time started to run from the date of the said letter. The SCJ was plainly wrong when she decided that the claim was time-barred under the LA. (paras 40-42)

Case(s) referred to:

Abdul Aziz Abdul Hamid & Yang Lain v. Perak Roadways Bhd [2007] 7 CLJ 161 HC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Bounty Dynamics Sdn Bhd (Formerly Known As Media Development Sdn Bhd) v. Chow Tat Ming & 175 Ors [2015] 2 AMCR 709 ***(refd)***
Buckland & Ors v. Farmar & Moody [1979] 1 WLR 221 ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***
Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***
KLC Placement Services Sdn Bhd & Anor v. Balakrishna Polanaido [2014] 1 LNS 1108 HC ***(refd)***
Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals [2017] 7 CLJ 295 CA ***(refd)***
Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***
Low Tin Yong v. Low Yong Thuan [2016] 5 CLJ 217 CA ***(refd)***
LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa Dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***
MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***
Mok Yii Chek v. Sovo Sdn Bhd & Ors [2015] 1 LNS 448 HC ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***
Sime Hok Sdn Bhd v. Soh Poh Sheng [2013] 2 CLJ 615 FC ***(refd)***
Tan Ah Thong v. Chee Pee Sad & Anor And Other Cases (Consolidated) [2009] 4 MLRA 341 ***(refd)***
Tan Kok Siang v. Kemuning Setia Sdn Bhd [2018] 8 CLJ 546 CA ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor [2017] 1 CLJ 436 CA ***(refd)***
Yaw Fun Fun v. Ketua Polis Daerah Gombak, Selangor & Ors [2018] 1 LNS 752 HC ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56(1), 65
Evidence Act 1950, s. 73A
Limitation Act 1953, s. 6(1)(a)

For the appellants - SP Chanravathane & Kee Li Ling; M/s C L Pon & Partners
For the respondent - Augustine Gregory Dicom & Anita Thaiyub Khan; M/s A G Dicom & Co

[Editor's note: Appeal from Sessions Court; Civil Suit No: A52NCVC-287-06-2014]

Reported by S Barathi

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] On 31 October 2018, this court had allowed the appellants' appeal against the decision of learned Sessions Court Judge ("SCJ") in Civil Suit No. WA-A52NCVC-287-06-2014 on 6 July 2018 in dismissing the appellants' claim with costs according to scale.

[2] Subsequently, the respondent filed a notice of motion in the Court of Appeal on 30 November 2018 seeking leave to appeal against the decision of this court. The motion was allowed on 8 July 2020. The notice of appeal was then duly filed in this court on 20 July 2020.

[3] The full grounds for the decision pronounced on 31 October 2018 are set out hereinbelow.

Background Facts

[4] The respondent is the registered and beneficial owner of the pieces of 99 years leasehold lands expiring on 10 March 2097 held under five separate land titles in the Mukim of Ayer Panas, Daerah Jasin, State of Melaka ("said land'). The respondent developed the said land into bungalow plots for the project known as the Bandar Golden Valley Golf Resort ("said project") on a joint venture basis with MBSB Development Sdn Bhd ("MBSB").

[5] By a sale and purchase agreement (bungalow plots) dated 20 October 1999 ("SPA"), the appellants, a married couple, purchased two bungalow plots of land namely, Lot C0388 and Lot C0389 ("said plots") at the said project from the respondent.

[6] The salient terms of the SPA are as follows:

(i) the appellants shall pay the purchase consideration sum of RM53,040 for each of the said plots by way of 95 monthly instalments of RM532 per month to the respondent with a final instalment of RM500 (refer cls. 6(ii) and 7 and the First Schedule);

(ii) the registration fees of RM2,000 paid by the appellants shall be treated as part payment towards the purchase price (refer cl. 6(i));

(iii) the respondent shall let the appellants into vacant possession of the said plots upon completion of the basic infrastructure works which shall not be later than 36 months from the date of signing of the SPA (refer cls. 1(b), 13 and 16);

(iv) the delivery of vacant possession is subject to the appellants having paid all the instalments to the respondent up to the date of all the instalments to the stage of completion of the basic infrastructure works and the performance and observance of all the terms and covenants of the SPA by the appellants (refer cl. 16(1));

(v) in the event that the said plots are not completed and ready for delivery of vacant possession by the completion date, the respondent shall pay to the appellants liquidated damages ("LD") calculated from day to day at the rate of 8% per annum on the purchase price of the said plots from the due date of basic infrastructure completion date to the date of completion of basic infrastructure of the said plots (refer cl. 16(4)); and

(vi) the respondent shall use its best efforts to obtain as expeditiously as possible the issue of the separate qualified document of title to the said plots and upon such issuance, and subject to the full payment of the purchase price and any other monies due and owing by the appellants to the respondent under the agreement, the respondent shall within 21 days execute a memorandum of transfer of the said plots to the appellants (refer cl. 11(2)).

[7] The appellants claimed that they have fully paid the purchase price for the said plots amounting to RM106,080 with the last instalment being made on 21 November 2007. Henceforth, the appellants repeatedly demanded for vacant possession of the said plots from the respondent but to no avail.

[8] On 8 July 2013, the appellants instructed their solicitors to send a notice to the respondent stating that the appellants have decided to rescind the SPA and request a refund of the sum of RM106,080 together with interest at 5% in the total amount of RM40,366 as damages. The total sum demanded from the respondent at that time was RM146,446.

[9] The respondent did not reply to the letter of demand. Therefore, on 11 June 2014, the appellants filed the suit in the Sessions Court of Kuala Lumpur claiming the sum of RM106,080 with interest at 8% per annum from 21 November 2007 until full settlement and costs.

The Trial At The Sessions Court

[10] In furtherance of para. 7 above, the appellants pleaded in paras. 7 to 9 of the amended statement of claim ("SoC") dated 1 December 2014 that:

7. Plaintif juga telah berkali-kali menuntut daripada Defendan untuk memberikan milikan kosong ("Vacant Possession") hartanah tersebut kepada Plaintif-Plaintif tetapi Defendan enggan, lalai dan gagal untuk memberikan milikan kosong walaupun segala bayaran telah pun diselesaikan.

8. Defendan telah gagal memenuhi terma-terma perjanjian tersebut sepertimana yang telah dipersetujui dan memungkiri Perjanjian Jual Beli tersebut.

9. Plaintif-Plaintif juga telah melalui surat tuntutan bertarikh 9/7/2013 daripada peguamcaranya, Tetuan C L PON & Partners telah memberikan notis untuk menamatkan Perjanjian Jual Beli untuk kedua-dua "Bungalow Plots untuk Lot. C0388 dan Lot C0380 dan menuntut untuk memulangkan segala wang yang telah dibayar termasuk faedah. Sehingga pemfailan Writ ini tidak ada sebarang jawapan diterima daripada Defendan mahupun surat tuntutan peguamcara Plaintif-Plaintif dijawab oleh Defendan.

and in para. 6 of the amended reply to defence dated 29 January 2018 that:

6. Plaintif tidak mengakui perenggan 10 dan 11 Pembelaan tersebut dan seterusnya akan mengatakan bahawa pembelaan had masa yang digunakan oleh Defendan adalah tidak bermerit. Plaintif-Plaintif akan mengatakan bahawa tuntutan Plaintif-Plaintif adalah tidak dihalang oleh had masa kerana sehingga hari ini Defendan belum lagi memberikan milikan kosong kepada Plaintif-Plaintif dan kausa tindakan dalam hal penamatan perjanjian antara Plaintif-Plaintif dan Defendan hanya terakru selepas Plaintif-Plaintif telah berniat untuk tamatkan perjanjian.

6.1 Plaintif-Plaintif menyatakan bahawa tarikh perjanjian adalah 20/10/1999 dan Plaintif-Plaintif telah membayar mengikut pembayaran berjadual ("scheduled payment") di dalam Perjanjian Jual Beli. Walaubagaimanapun Plaintif-Plaintif menyatakan bahawa pembayaran terakhir hanya dibuat pada 21/11/2007. Maka masa 36 bulan hanya bermula pada tarikh tersebut untuk pihak Defendan menyerahkan milikan kosong kepada Plaintif.

[11] In the defence dated 4 July 2014, the respondent pleaded, *inter alia*, that:

(i) the appellants entered into the SPA with full knowledge that the respondent was only the land owner whereas MBSB was the developer. The respondent was a victim and suffered losses following MBSB's failure to perform the obligations under the joint venture agreement;

(ii) the monthly instalments paid by the appellants towards the purchase price for the said plots, if any, were paid into the project account of the respondent/MBSB at Bank Bumiputra Malaysia Bhd which has since been frozen pursuant to an order of the court dated 25 October 2007; and

(iii) the appellants' claim was time-barred under s. 6 of the Limitation Act 1953 (Act 254) ("LA 1953") since the cause of action arose on 20 October 2002 when the respondent allegedly had to deliver vacant possession of the said plots to the appellants. The writ and SoC should have been filed on or before 20 October 2008.

[12] There was only one agreed fact namely, that the parties had entered into the SPA. There were four issues to be tried, *viz*, whether (i) the appellants are entitled to the reliefs as prayed in the SoC; (ii) the respondent has proven its defence; (iii) the appellants' claim is time-barred; and (iv) the appellants have paid the amount as claimed to the respondent.

[13] At the trial, the second appellant; the Director of MBSB; and Mr CL Pon, advocate and solicitor, gave evidence for the appellants as PW2, PW1 and PW3, respectively. The respondent chose not to call any witnesses and submitted that there was no case to answer.

[14] In the grounds of judgement, the SCJ identified the issues for her determination as whether:

(i) the respondent had breached the SPA and was liable to pay the sum of RM106,080 to the appellants; and

(ii) the appellants' claim is time-barred.

[15] On the issue as per sub-para. 14(i) above, the SCJ undertook a detailed analysis of the testimony of the witnesses and provisions in the SPA at paras 34 to 60 of her grounds and held in favour of the appellants based on the following reasons:

(i) the SPA was entered into between the parties and not between the appellants and MBSB;

(ii) it is the responsibility of the respondent as vendor to perform all its obligations under the SPA, including to deliver vacant possession of the said plots to the appellants pursuant to cl. 16 of the SPA;

(iii) although the court dismissed the appellants' application to call the solicitor, Mr Augustine Gregory Dicom, as a witness for the appellants, the court accepted the computer generated receipts issued by the respondent for payments made by the appellants as exhs. P1 and P2 and the transaction listing as exhs. P3 and P4 under s. 73A of the Evidence Act 1950 (Act 56);

(iv) the respondent's allegation that it never received the instalment payments and that it did not issue any receipts for payments is far from the truth since, *inter alia*, the respondent had written a letter dated 16 September 2000, which is a document in Part A of the bundle of documents, stating that the appellants must pay the arrears in the instalments amounting to RM2,660 to the respondent, failing which the SPA will be terminated; and

(v) the burden of proof had shifted to the respondent to rebut the allegations by the appellants as to the payments made and issuance of the receipts but in view of the respondent's option of submitting a no case to answer, the respondent had failed to discharge this burden of proof.

[16] However, as regards the issue as per sub-para. 14(ii) above, learned SCJ found that the respondent should have handed over vacant possession on 20 October 2002 and the appellants' right to sue had accrued on that date and not on the date as pleaded by the appellants. Hence, she held that the appellants' claim must be dismissed for being time-barred.

The Memorandum Of Appeal

[17] The only issue that arose for consideration in this appeal was whether the appellants' claim is time-barred by para. 6(1)(a) of the LA 1953. The grounds of appeal in the memorandum of appeal states, among others, that learned SCJ erred in law and in fact when she:

(i) failed to understand the cause of action as pleaded by the appellants namely that the respondent did not comply with the terms of the SPA by failing to give vacant possession of the said plots or to transfer the same to the appellants despite the fact that full payment has been made by the appellants; and

(ii) found that the appellants' claim was time-barred.

The Law

[18] In *Yaw Fun Fun v. Ketua Polis Daerah Gombak, Selangor & Ors* [2018] 1 LNS 752, this court had referred to a series of cases which have elucidated on the applicable legal principles when determining whether the decision of a lower court is to be upheld or reversed on appeal (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa Dan Pustaka* [2014] 9 CLJ 1064; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; *Low Tin Yong v. Low Yong Thuan* [2016] 5 CLJ 217; and *Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals* [2017] 7 CLJ 295).

[19] It is trite that an appellate court will not readily interfere with the findings of fact arrived at by a trial court but this does not mean that the appellate court will turn a blind eye in the situation where the findings of the trial court is "plainly wrong". The burden lies on the appellants to show that that the Sessions Court has so fundamentally misdirected itself; there being no or insufficient judicial appreciation of the pleadings and evidence, or where the acceptance or rejection of the evidence is not founded on good reasons, and/or no reasonable judge could have arrived at the conclusion as she did. It is only in these well-defined circumstances that the court would intervene in order to prevent a miscarriage of justice.

Submissions Of The Appellants

[20] The appellants submitted that the SCJ had erroneously decided that the appellants' claim should be dismissed based on the defence that the action is time-barred when the respondent did not lead any evidence to that effect. On the other hand, the appellants had provided unrebutted evidence that:

(i) the appellants had paid the consideration amount in full and discharged all their obligations under the SPA; and

(ii) the respondent did not fulfil any of its obligations under the SPA.

[21] It was also contended that the SCJ failed to appreciate the difference between the terms of the SPA in this case with the ones in the standard SPA where in the former, the respondent has the obligation to have the said land subdivided to enable vacant possession to be given to the purchasers; vacant possession is to be given after the full purchase price has been paid; the purchase price was paid in instalments over 96 months beginning from the date of the SPA on 20 October 1999; and the said plots are to be transferred to the appellants' name within 21 days upon issuance of the separate qualified title.

[22] The appellants' counsel further argued that the SCJ erred when she held that the appellants' claim was for damages for breach of contract when in actuality, the claim was for return of monies paid due to non-performance by the respondent. The SCJ ignored the principle of law that an innocent party to a contract can elect to either rescind the contract upon breach by the other party or treat it as still subsisting either by words or conduct. It was clear from the evidence before the Sessions Court that the appellants had treated the contract as still subsisting when they continued to pay the monthly instalments towards the purchase price for the said plots even after the expiry of 36 months, ie, until 27 November 2007 when the full sum was paid completely.

[23] Hence, the appellants' counsel submitted that the period of limitation for filing the suit does not begin to run unless and until the appellants decide to terminate or rescind the SPA which was on 8 July 2013. The suit was filed on 11 June 2014 which is within six years as contemplated by the law.

[24] It was additionally argued that the SCJ fell into error when she distinguished between termination and rescission of the SPA when the matter was not pleaded by any party.

Submissions Of The Respondent

[25] To the respondent, the primary complaint of the appellants is that the respondent failed to deliver vacant possession of the said plots on 20 October 2002, which is within 36 months from the date of the SPA as provided under cl. 16(1), and therefore breached the SPA. Thus, based on trite principles of law regarding limitation, time starts to run from the date of the breach.

[26] It was submitted that the six-year limitation period allowed under para. 6(1)(a) LA 1953 for the appellants to file the claim expired on 20 October 2008. By filing the writ and SoC on 11 June 2014, learned SCJ arrived at the correct conclusion that the appellants' claim is time barred. Reliance was placed on the case authorities of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; *Abdul Aziz Abdul Hamid & Yang Lain lwn. Perak Roadways Bhd* [2007] 7 CLJ 161; and *Bounty Dynamics Sdn Bhd (Formerly Known As Media Development Sdn Bhd) v. Chow Tat Ming & 175 Ors* [2015] 2 AMCR 709.

Findings Of The Court

[27] Firstly, para. 6(1)(a) of the LA 1953 provides as follows:

> **Limitation of actions of contract and tort and certain other actions**
>
> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> ...

[28] Several provisions in the SPA are relevant to the subsequent discussions and thus, it is useful at the outset to refer to these provisions, namely:

(i) Clause 16(1) on "delivery of vacant possession" reads:

> Subject to the Purchaser having paid to the Vendor up to date of all the instalments to the stage of completion of the Basic Infrastructure Works as prescribed in section 6 of the Third Schedule hereto and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Vendor shall let the Purchaser into vacant possession of the said Plot upon completion of the Basic Infrastructure Works referred to in Clause 13 hereof which in any case shall not be later than Thirty-Six (36) months from the date hereof (hereinafter referred to as "Basic Infrastructure Completion Date").

(ii) The words "basic infrastructure"is defined in cl. 1(b) (see too, the same definition which appears in the Third Schedule of the SPA) to mean:

> ... all infrastructures or any part thereof on the Project Land leading to the vicinity of the said Plot relating to:
>
> (i) main roads within the Project Land;
>
> (ii) main drains;
>
> (iii) water reticulation mains with water tank(s);
>
> (iv) sewerage mains with sewerage treatment plant(s);

A (v) the infrastructure necessary and required by the relevant authorities for the provision of electricity supply and street lightings; and

(vi) telephone infrastructure necessary to facilitate the laying of cables and posts by the relevant authority;

B in accordance with the requirements and standards of the relevant authorities.

(iii) Clause 1(b) further defines "basic infrastructure completion date" as "36 months from date of this agreement"; and "purchase price" as "the sum specified in s. 4 of the First Schedule hereto".

C

(iv) Section 4 of the First Schedule in the SPA states that the purchase price is RM53,040 whilst s. 6 shows the monthly instalments to be paid as 95 instalments in the sum of RM532 and a final instalment for the amount of RM500.

D **[29]** Learned SCJ referred to the evidence given by PW2 and PW3 as well as the solicitor's letter dated 8 July 2013 in these paragraphs of her grounds of judgment:

67. Berdasarkan keterangan saksi-saksi Plaintif ini iaitu *SP2 dan SP3 sendiri telah bersetuju bahawa Defendan sepatutnya memberikan serahan milikan kosong* E *kedua-dua lot bungalow tersebut pada 20.10.2002 dan Defendan telah gagal berbuat demikian kepada Plaintif-plaintif.*

…

69. Berdasarkan surat bertarikh 8.07.2013 ini, Mahkamah mendapati pihak Plaintif-plaintif *telah membatalkan atau "rescind"perjanjian-perjanjian jual* beli F bertarikh 19.10.1999 tersebut. Namun begitu, di *dalam perenggan 9 Writ Saman dan Pernyataan Tuntutan Terpinda dan perenggan 6 Jawapan Plaintif-plaintif*, Plaintif-plaintif menyatakan *Plaintif-plaintif menamatkan atau "repudiate"perjanjian-perjanjian jual beli tersebut* berdasarkan surat Peguamcara Plaintif-plaintif bertarikh 8.07.2013 kepada Defendan. Pihak Plaintif-plaintif telah menggunakan G *2 terma yang membawa maksud dan kesan yang berbeza dalam undang-undang kontrak iaitu pembatalan (rescind) dan penamatan (repudiation) kontrak.*

70. Di dalam undang-undang kontrak, terma "*rescind*"atau "*repudiate*"adalah *membawa maksud dan kesan yang berbeza*. Bagi *penamatan kontrak atau "repudiation"*(seksyen 40 Akta Kontrak 1950), sesuatu H penamatan itu berlaku apabila sesuatu pihak tidak mahu lagi menjalankan obligasi di dalam perjanjian dan ianya adalah *"voidable at the option of the promisee"*. Manakala *"rescindment"atau pembatalan kontrak* (seksyen 65 Akta Kontrak 1950) adalah apabila sesuatu pihak membatalkan sesuatu perjanjian atas sebab contohnya terdapat salah nyata (misrepresentation) atau kesilapan (mistake) dan sebagainya. Kesannya adalah "*void ab* I *initio*"seolah-olah kontrak tersebut tidak wujud. Mahkamah ini telah merujuk kepada kes Mahkamah Persekutuan iaitu *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v. M Concept Sdn Bhd* [2010] 1 MLJ 597 …

...

Berdasarkan otoriti diatas, ianya jelas menerangkan bahawa pembatalan kontrak (rescind) dan penamatan kontrak (repudiate) membawa maksud dan kesan yang berbeza. Pihak Plaintif-plaintif telah menggunakan kedua-dua perkataan ini dimana di *dalam pliding*, pihak Plaintif-Plaintif menyatakan *penamatan kontrak (repudiation)* berdasarkan *surat peguamcara Plaintif-plaintif bertarikh 8.07.2013 … namun kandungan surat tersebut menyatakan sebaliknya iaitu telah dinyatakan pembatalan kontrak (rescind).*

(emphasis added)

[30] Based on my scrutiny of the record of appeal, I find that:

(i) in her witness statement, PW2 said this:

Q. 16 When are you supposed to get your vacant possession for the 2 lots?

A: According to Section 16 of the Sale & Purchase Agreement, the vacant possession of the property must be delivered to us upon completion of the Basic Infrastructure Works and in any case shall not be later than 36 months from the date of the sale & purchase agreement but that is subject to us having paid to the Defendant being the Vendor up to date of all the instalment. We completed payment of instalment on 21-11-2007. So within 36 months from 21-11-2007 the Defendant should have delivered the vacant possession to us that is by 21-11-2010 but the Defendant failed.

Q. 17 What did you do after that?

A: We waited until 2013 for the Defendant to deliver vacant possession but we came to know that even the basic infrastructure was not completed. So we instructed our solicitors' Messrs CL Pon & Partners to demand for refunds of monies paid and to inform that that we are rescinding the contract due to the undue delay in the Defendant fulfilling their obligation under the Sale & Purchase Agreement.

Further, when cross-examined, PW2 maintained that the respondent was supposed to deliver vacant possession of the said plots to the appellants within three years from the full payment of the purchase price. PW2 also explained her understanding is that since the respondent failed to deliver vacant possession to her and her husband, they therefore want to claim back the principal amount and a "little of interest"; and

(ii) PW3 testified that he had prepared the letter dated 8 July 2013 whereby the salient parts are quoted below:

...

Please be informed that our clients have decided to rescind the Sale and Purchase Agreement dated 20/10/1999 and they request a refund of all the monies paid together with damages suffered by them.

A …

> Kindly let us have the sum of RM146,446-00 being the refund of all the monies paid to your goodselves together with the damaged suffered by our client within fourteen (14) days, failing which, we have strict instruction to proceed with legal proceeding to claim against your goodselves pertaining to the said sum and in which event; you shall be liable for all cost and expense incurred including Solicitors and client fee pertaining to the legal action to be commenced against your goodselves.

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During cross-examination, PW3 said that the respondent have to deliver vacant possession after they have completed the basic infrastructure works which they were supposed to do within 36 months and since this was not achieved, the respondent had breached the SPA.

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[31] Reading the grounds of judgment, learned SCJ evidently took issue with the wordings in the appellants' pleadings as compared with the letter dated 8 July 2013 despite the fact that the respondent did not raise this as one of the arguments in the submissions at the end of the trial. In this regard, I agree with the appellants that the trial court is not entitled to decide a suit on a matter on which no issue has been raised by the parties (see *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42 and *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 at p. 1116. Even if the SCJ was minded to undertake an examination of the matter, she should have invited the counsels to submit on the purported variance in the choice of words used in the appellants' pleadings and in the said letter before pronouncing her decision.

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[32] The next observation to be made is that, whilst the SCJ had correctly translated the word "rescission" as "pembatalan" in the national language, the word "repudiation" is more accurately translated as "penolakan" rather than "penamatan", which is commonly interpreted as "termination". A party is said to have repudiated the contract or renounced the contract where that party indicates to the other, by conduct or in clear terms, an intention not to go on with the contract. As for termination of the contract, cl. 10(1)(a) to (d) in the SPA provides for four events of default on the part of the appellants as purchasers and which give the respondent, as vendor, the right to take such legal action as it deems fit or to annul the sale of the said plots and forthwith terminate the SPA. Meanwhile, the appellants' recourse for the respondent's failure in delivering vacant possession of the said plots lies in cl. 16(4) being a claim for LD and the remedies as provided in the Contracts Act 1950 (Act 136) ("CA 1950"). In this regard, the learned SCJ had alluded to ss. 40 and 65 of the CA 1950 in para. 70 of her written judgment as above-quoted and she goes on to say that:

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> Berkenaan perkara ini, Mahkamah telah merujuk kepada **keterangan saksi-saksi Plaintif** dan mendapati bahawa **pihak-pihak telah menamatkan kontrak (repudiate) dan bukan membatalkan kontrak (rescind)** kerana tiada salah nyata (misrepresentation) atau kesilapan

(mistake) dalam kes ini. Surat peguamcara Plaintif-plaintif **bertarikh 8.07.2013** telah diberikan kepada Defendan untuk **menamatkan perjanjian mereka (repudiate)** atas **sebab kegagalan Defendan menyerahkan milikan kosong bersama infrastruktur** asas (basic infrastructure) dan telah **selesai membayar penuh ansuran bulanan** kedua-dua lot bungalow tersebut pada tahun 2007.

(emphasis added)

[33] With respect, the trial judge's finding that "pihak-pihak telah menamatkan kontrak (repudiate) dan bukan membatalkan kontrak (rescind) kerana tiada salah nyata (misrepresentation) atau kesilapan (mistake) dalam kes ini" is flawed for the following reasons:

(i) Section 40 of the CA 1950 provides that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the innocent party may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance. In *Tan Kok Siang v. Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546; [2018] 6 MLJ 652, the Court of Appeal referred to s. 40 of the CA 1950 and the two illustrations given and then explicated that:

> [17] To understand s. 40, we will need to "hearken to first principles, for it is a failure to appreciate these, we apprehend, which is the cause of confusion in the mind of the appellant …' per Gopal Sri Ram JCA (as he then was) in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 at p. 681. From the provisions of s. 40, it is apparent that a contract is not automatically brought to an end by a repudiatory breach. The right to terminate or rescind a contract is not available in every case of repudiation. That right is dependent on, *inter alia*, the nature of the term breached, and the conduct of the parties, "whether the breach is of sufficient gravity to allow the other party to rescind the contract' – see Visu Sinnadurai on the *Law of Contract*, p 941. In the Court of Appeal's decision in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, the "first principles" were reminded and it is the function of the trial court to examine all the evidence led and determine the real facts in order to come to a decision on those material first principles:
>
> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie, the party who is not guilty of the breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. …

A

> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.
>
> [18] At p. 682, the Court of Appeal further opined:
>
> > Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

B C

The court went on to explain the common law doctrine of election by alluding to the judgment of the Federal Court in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 and the decision of the Court of Appeal in *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619; [1998] 3 MLJ 860 before stating that:

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> [21] Where the innocent party elects to affirm the contract, the contract is treated as still continuing with the rights and obligations of both parties still intact and, each party has a right to sue the other for damages – see Visu Sinnadurai on the *Law of Contract* (4th Edn, LexisNexis), pp 938-940. However, where the election is to terminate, rescind or end the contract by reason of the breach, the innocent party is itself released from further performance of the contract. ...
>
> ...
>
> [27] … In *Pollock & Mulla: Indian Contract and Specific Relief Acts* (12th Edn, Vol 1), p 1000, the learned authors explained that a refusal to perform any part of the contract, however small, is a refusal to perform the contract "in its entirety". The "kind of refusal contemplated in s 40 is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for". … .

E F G

(ii) The SCJ's understanding of the term "rescission" is apparently in the context of rescission affecting the formation of the contract, ie, where the consent to an agreement had been caused by coercion, fraud, misrepresentation or undue influence. The contract would then be voidable at the option of the party whose consent was so caused. The effect of the rescission on the contract is that the contract is treated as though it was never made at all or often described as rescission *ab initio*. However, there is another setting in which an act of rescission could arise and that is where the innocent party opts to put an end to the contract and treats himself as being discharged from further obligations

H I

under it in consequence of the other party refusing to perform or disabling himself from performing a fundamental term to the contract, ie, the s. 40 of the CA 1950 scenario. Various phrases have been used to describe such an action by the injured party, "discharged the contract", "terminated the contract" or "brought an end to the contract". Buckley LJ in the case of *Buckland & Ors v. Farmar & Moody* [1979] 1 WLR 221 aptly said that "rescind" is a word which is capable of more than one meaning; it may be used to describe the effect of the sort of relief that is normally granted where the formation of a contract has been vitiated by factors which render it proper for the contract to be annulled from the time that it was purported to have been made. The word can also be used to describe the consequences of acceptance by one party to a contract of a repudiation of the contract by another party by breach of an essential term of the contract (refer to *The Law of Contract*, 4th edn, LexisNexis, 2011 by Dato' Seri Dr Visu Sinnadurai at pp. 934 to 936). Hence, learned SCJ did not fully appreciate the fundamental principles on terminologies used in the law of contract in her analysis of the usage of the word "rescind" in the letter dated 8 July 2013 and "menamatkan" in the amended SoC.

(iii) The parties to this appeal have expressly stipulated that time shall be the essence of the contract in relation to all provisions of the SPA (see cl. 25 in the SPA). According to sub-s. 56(1) of the CA 1950, where time is of the essence of the contract, failure to perform within the stipulated time will entitle the injured party to elect whether to insist on performance of the contract and sue for damages or to bring the contract to an end. In *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151, the Federal Court speaking through Salleh Abbas FCJ, held at pp. 366-370 (CLJ); pp. 153 and 156 (MLJ) that:

> In modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. ...
>
> ... *If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large*. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.
>
> (emphasis added)

Later, George Seah FJ in *Ganam*'s case (*supra*) said the following with regard to time being the essence of the contract:

> In a contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of the essence of the contract [see *Jamshed v. Burjorji* AIR 1915 PC 83, *Stickney v. Keeble* [1915] AC 386, *Warren v. Tay Say Geok & Ors* [1965] 1 MLJ 44 and section 56(1) of the Contracts Act 1950]. Intention may either be express or implied and there are three cases in which time is of the essence of the contract.
>
> (a) where the contract expressly states that time shall be of the essence of the contract [*Steedman v. Drinkle* [1916] 1 AC 275 and *Brickles v. Snell* [1916] 2 AC 599];
>
> (b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable [*Stickney v. Keeble* (*supra*)].
>
> (c) where from the nature of the property time may be considered to be of the essence of the contract [*Tilley v. Thomas* (1867) 3 Ch App 61].
>
> These three principles are cited by the then Court of Appeal in the case of *Haji Hasnan v. Tan Ah Kian* [1963] MLJ 175 176. In *Yeow Kim Pong Realty Ltd v. Ng Kim Pong* [1962] MLJ 118 120 the Privy Council said at page 120.
>
> > The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances.

Further, the pronouncement of the Federal Court in the following passage from the case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 at p. 277 as delivered by Zulkefli Makinudin FCJ is illustrative of the interplay between s. 40 and sub-s. 56(1) of the CA 1950:

> As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case s. 56(1) should be read together with s. 40 of the Act in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform it promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration. What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the SPA. Indeed the facts before the court showed that the construction of the property was completed and was in the state of delivery to the respondent. It

> is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD as agreed upon in the SPA and that the respondent has no right to rescind the SPA.

The facts of the case in the present appeal is completely juxtaposed to that in *Berjaya Times Square* (*supra*) since no evidence was submitted before the trial court to show that the said lots were in the state of delivery to the appellants.

(iv) The doctrine of total failure of consideration can also be gleaned from cases such as *TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor* [2017] 1 CLJ 436; [2017] 1 MLRA 143; *KLC Placement Services Sdn Bhd & Anor v. Balakrishna Polanaido* [2014] 1 LNS 1108; [2014] MLRHU 670; *Mok Yii Chek v. Sovo Sdn Bhd & Ors* [2015] 1 LNS 448; [2015] MLRHU 196 (where the court, just as in *TTDI Jaya* (*supra*), professed that it is bound as a matter of *stare decisis* to follow *Berjaya Times Square albeit* the views expressed by learned author of *The Law of Contract* (*supra*, at pp. 1039 and 1042) that the said doctrine rightly belongs to the realm of the law of restitution rather than in a case dealing with the general principles of the laws of contract); *Tan Ah Thong v. Chee Pee Sad & Anor and Other Cases (Consolidated)* [2009] 4 MLRA 341; and *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; [2007] 1 MLRA 121. Basically, in determining whether there has been a total failure of consideration, the court must interpret the promise as a whole and then view the performance of the promise from the perspective of the party in default. The test to be applied is whether the party in default has failed to perform his promise in its entirety.

[34] The error in the initial part of learned SCJ's reasoning and the failure to recognise what is exactly the appellants' cause of action inevitably had an impact on the SCJ's findings in relation to the issue of limitation period under the LA 1953 as shown below:

> 71. Mahkamah berpendapat bahawa *tarikh bermulanya kausa tindakan penamatan kontrak (repudiation)* ini adalah sepatutnya pada *20.10.2002 kerana klausa 16(1)* perjanjian-perjanjian tersebut telah menyatakan bahawa *tanggungjawab Defendan sebagai penjual (vendor)* adalah *menyerahkan milikan kosong premis* tersebut bersama infrastruktur asas *selama 36 bulan* dari tarikh perjanjian-perjanjian jual beli iaitu *pada 20.10.1999*. Oleh yang demikian, *pada 20.10.2002* apabila Defendan gagal menyerahkan milikan kosong lot-lot bungalow tersebut, Defendan telah *memungkiri* perjanjian-perjanjian jual beli tersebut dan *bermula kausa tindakan* terhadap Defendan.
>
> ...
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> 74. Mahkamah berpendapat bahawa *tarikh kemungkiran* perjanjian-perjanjian jual beli ini *berlaku dan bermula* apabila *Defendan telah gagal untuk menyerahkan milikan kosong kedua-dua lot bungalow no. C0388 dan C0389*

A *bersama infrastruktur asas di bawah klausa 16* perjanjian-perjanjian jual beli tersebut iaitu *20.10.2002* sebagai *mula hak untuk mendapatkan milikan kosong Plaintif-Plaintif telah dilanggar oleh Defendan (date on which that right is infringed).*

75. Seterusnya, Plaintif-plaintif juga telah *mendakwa* bahawa Defendan telah gagal untuk memberikan milikan kosong tersebut *walaupun mereka*
B *telah membayar penuh wang ansuran pada tahun 2007*. Keadaan ini menyebabkan mereka telah *menamatkan kontrak* tersebut melalui surat peguamcara mereka pada *8.07.2013*.

76. Plaintif-plaintif seharusnya memulakan tindakan terhadap Defendan *dalam masa 6 tahun* iaitu sehingga 20.10.2008 tetapi Plaintif-plaintif hanya
C memfailkan tindakan terhadap Defendan *selepas 6 tahun* iaitu pada *11.06.2014 yang bertentangan dengan seksyen 6(1) Akta Had Masa 1953*.

77. Plaintif-plaintif yang mendakwa dirinya sebagai *pihak yang tidak bersalah harus membuat pilihan berdasarkan kemungkiran Defendan dan melaksanakannya dalam tempoh tersebut samada ingin menuntut gantirugi kelewatan penyerahan milikan kosong (LAD) ataupun menamatkan kontrak dan*
D *menuntut semula wang yang dibayar (repudiate the contract).* Malangnya, surat Peguamcara Plaintif-plaintif bertarikh *8.07.2013* yang *menamatkan kontrak tersebut telah dibuat setelah tamat tempoh 6 tahun*. Oleh yang demikian, ianya adalah dibatasi oleh had masa.

78. Sekiranya *tarikh kemungkiran* didakwa oleh Plaintif-plaintif bermula
E pada *21 November 2007* iaitu *tarikh ansuran akhir dibayar* oleh Plaintif-Plaintif namun tindakan ini hanya dimulakan oleh Plaintif-Plaintif pada *11.06.2014* iaitu *setelah 6 tahun juga* dan ianya juga adalah disekat oleh had masa. Oleh yang sedemikian, Mahkamah menolak tuntutan Plaintif-Plaintif terhadap Defendan. (emphasis added)

F **[35]** In the appellants' submission after the trial, it was made clear that they are not claiming for vacant possession or LD but they are exercising their right to opt to accept the respondent's breach and rescind the contract *vide* the letter dated 8 July 2013 thereby bringing the SPA to an end or in other words, terminating the same. The reliefs sought following the total failure of consideration on the part of the respondent are for a refund of the purchase
G price paid by the appellants to the respondent in the sum of RM106,080 with interest thereon and costs, and not for LD or damages. In this respect, the appellants' solicitors rightfully submitted to the trial judge that the cases cited by the respondent on the issue of the statute of limitation are distinguishable based on the factual matrix in those cases as compared to the instant case.

H **[36]** It is observed that the way cl. 16(1) in the SPA was drafted is not without difficulties. There is an inherent contradiction between the words "subject to the purchaser having paid to the vendor up to date of all the instalments to the stage of completion of the basic infrastructure works as prescribed in s. 6 of the Third Schedule hereto" with the words "upon
I completion of the basic infrastructure works referred to in cl. 13 hereof which in any case shall not be later than 36 months from the date hereof".

There are altogether 96 instalments to be paid by the appellants and therefore it took them around eight years to complete the payments whereby it was in evidence that the last instalment was paid on 21 November 2007.

[37] It is my considered view that it is open to the appellants to take the stance that they are entitled to vacant possession of the said plots only upon full payment of all 96 instalments in light of the opening words in cl. 16(1) of the SPA. Furthermore, despite cl. 25 of the SPA providing that time shall be the essence of the contract, the fact that the appellants continued to make payments towards the purchase price of the said plots despite the respondent not having let the appellants into vacant possession of the said plots within 36 months from the date of the SPA, ie, by 20 October 2002 goes to show that the appellants treated the contract as still afoot but time ceased to be of the essence of the contract and becomes at large.

[38] The record of appeal does not disclose any correspondence from the appellants to the respondent between 20 October 2002 and 7 July 2013 (being one day before the letter was sent by the appellants' solicitor to the respondent) which could be said to amount to a notice fixing a reasonable time for performance of the respondent's part of the bargain. In *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2013] 2 CLJ 615; [2013] 2 MLRA 636, the apex court referred to the decisions in *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89; [1999] 1 MLJ 65 and *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 and said, *inter alia*, that:

> [14] The long and short of it, as held and observed in *Hock Huat Iron Foundry*, is that where a party not in default does not rescind a contract under s. 56(1) of the Contracts Act 1950 but allows the party in default to complete the work beyond the completion date, then time is no longer of the essence of the contract, and that when time is at large, the promisor must perform the promise within a reasonable time as provided under s 47 of the Act, and if there is unreasonable delay the party not in default may give a notice fixing a reasonable time for performance after the expiration of which the party not in default would treat the contract as at an end (rephrased from *Law of Contract in Malaysia* by A Mohaimin Ayus at p 20). Again it was not held, only that time by the Court of Appeal, that a notice fixing a reasonable time for performance is required before breach of a promise in which time for performance is not specified could crystallise. Indeed, we were not shown any authority that ruled that such notice is essential before breach could occur. Rather, to the contrary, there is a decision of this court, namely *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2012] 1 AMCR193; [2011] 6 MLJ 464, that could not but only point that breach occurs after the expiration of reasonable time for performance.
>
> …

A

> [16] In relation to the third question, the Federal Court held that in commercial contracts, time is of the essence, that even if time were at large, there was still a duty on the plaintiff to commence work within a reasonable time, and as the plaintiff had failed to commence any development activity, the plaintiff was in breach of the PDA which justified termination. ...
>
> [17] There was no notice fixing time for performance in *Damansara Realty Bhd*. Yet it was held by the Federal Court that there was a breach of the PDA when the plaintiff failed to commence development within a reasonable time. In other words, under s 47, a prior notice fixing time for performance is not a precursor to breach.

C

In para. 19 of the judgment, an excerpt from *Halsbury's Laws of England* (4th edn), Reissue, vol 9(1) at para. 935 was quoted where for present purposes the pertinent part states "Even if the party not in default gives no notice, he may still be entitled to rescind if he proves that the other party would anyway not have been able to perform within a reasonable time …", and note 14 to the said para. 935 which states "Similarly, where a party in default makes it clear by his conduct that he does not intend to proceed, such a notice is unnecessary" was also mentioned.

[39] It cannot be denied that the appellants have given more than reasonable time for the respondent to perform its promise under the SPA. Years have passed and the respondent did not produce any evidence to show that the said land has been subdivided. Vacant possession of the said plots was definitely not delivered to the appellants and nor was a memorandum of transfer of the said lots to the appellants ever executed. The respondent has clearly repudiated fundamental terms of the contract and is by its conduct, in default of the same. The appellants opted to accept the repudiation and treat the agreement as at an end when they directed their solicitors to send the letter dated 8 July 2013 to the respondent.

[40] The issue of whether the appellants had, by any words or conduct, waived their right to rescind the contract on account of the respondent's repudiation and the right to treat themselves as discharged therefrom was not pleaded in the defence and was not one of the issues to be tried. Nor was there any pleading on estoppel by conduct or any other reason to disentitle the appellants from exercising the right to rescission of the SPA.

[41] In the circumstances of this case, a reasonable time for performance of the respondent's promise ended with the issuance of the letter dated 8 July 2013 when the appellants treated the respondent as having breached the SPA. With such breach, the cause of action accrues and time starts to run from the date of the said letter.

I

Conclusion

[42] In the upshot, this court agreed with the appellants that learned SCJ was plainly wrong when she decided that their claim was time-barred under the LA 1953. The appellants' appeal was thus allowed and as for costs, the appellant's counsel prayed for costs of RM30,000 at the High Court and Sessions Court.

[43] The respondent's counsel retorted that only one point was raised on appeal and no complicated issues arose at the trial. Therefore, a total costs of RM10,000 was submitted as a fair amount. This prompted the appellant's counsel to bring up the fact that the respondent's counsel was also the respondent's company secretary and an application was made to call Mr Augustine Dicom as a witness at the trial but it was pointed out that the application was dismissed.

[44] Taking all the factors into account, in my view, a sum of RM15,000 as costs here and below is reasonable and appropriate, subject to the payment of the allocator fees.